

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES DURHAM,	§
	§
Defendant Below,	§ No. 328, 2011
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware, in and
STATE OF DELAWARE,	§ for Kent County
	§ Cr. ID 1003006262
Plaintiff Below,	§
Appellee.	§

Submitted: November 16, 2011

Decided: January 3, 2012

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

ORDER

This 3rd day of January 2012, upon consideration of the appellant's Supreme Court Rule 26(c) brief, his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) In October 2010, a Superior Court jury found the defendant-appellant, James Durham, guilty of first degree robbery and related charges. Following the jury's verdict, Durham filed a motion for new trial, which the Superior Court denied after a hearing. In June 2011, the Superior Court sentenced Durham as an habitual offender to twenty-seven years at Level V incarceration followed by a period of decreasing levels of supervision. This is Durham's direct appeal.

(2) Durham's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Durham's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Durham's attorney informed him of the provisions of Rule 26(c) and provided Durham with a copy of the motion to withdraw and the accompanying brief. Durham also was informed of his right to supplement his attorney's presentation. Durham has raised several issues for this Court's consideration. The State has responded to Durham's arguments, as well as to the position taken by Durham's counsel, and has moved to affirm the Superior Court's judgment.

(3) The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (b) this Court must conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.¹

¹ *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

(4) Durham wrote several letters in response to his counsel's brief and motion to withdraw. These letters appear to raise three claims for the Court's review on appeal. First, Durham claims that the Superior Court erred in denying his motion for a new trial based on witness recantation. Second, he asserts that the Superior Court erred in denying his motion for continuance to obtain new counsel. Finally, Durham contends that he was denied his right to recall the recanting witness at the evidentiary hearing to ask her additional questions after her former lawyer had testified for the State to rebut the witness' allegations of coercion. We address these claims in order.

(5) A motion for new trial based on the recantation of a witness is generally viewed with suspicion, and the denial of such a motion will be upheld on appeal unless the trial court abused its discretion.² In this case, Durham's motion for new trial was based on the argument that his codefendant and long-time paramour, Shelva Smith, had been coerced to testify against him at trial and subsequently recanted that testimony. The Superior Court, in reviewing Durham's motion, applied the three-part test set forth in *Larrison v. United States*³ to determine whether Durham's motion for new trial based on recanted testimony should be granted.

² *Blankenship v. State*, 447 A.2d 428, 433 (Del. 1982).

³ *Larrison v. State*, 24 F.2d 82 (7th Cir. 1928).

Larrison held that a new trial motion should be granted if: (i) the trial court is reasonably well satisfied that the testimony given by a material witness is false; (ii) without the testimony, the jury might have reached a different verdict; and (iii) the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after trial.⁴

(6) In this case, the Superior Court denied Durham's motion because it found that Smith's testimony was reliable, as it was consistent with her initial statement to police, which had been made long before Smith allegedly was coerced into testifying against Durham at his trial. Furthermore, the Superior Court also found that Durham could not fairly claim to be surprised by Smith's trial testimony because a copy of her statement to police implicating him had been provided during discovery in April 2010, months before the October trial. Thus, Durham had ample opportunity to prepare for Smith's incriminating testimony. Under the circumstances, we find no abuse of discretion in the Superior Court's denial of Durham's new trial motion. Accordingly, we reject this first claim on appeal.

(7) Durham next claims that the Superior Court erred in denying his motion for a continuance to retain new trial counsel. Durham made his

⁴ *Id.* at 87-88.

request on the first day of trial. As this Court has previously stated, the denial of a motion for a continuance on the eve of trial in order to obtain new counsel is not an abuse of discretion: (i) when there was no previous complaint about counsel; (ii) there was ample opportunity to obtain substitute counsel; and (iii) obtaining substitute counsel was uncertain and appeared to be a dilatory tactic.⁵ In this case, there was no indication that Durham's appointed counsel was not prepared to go forward with trial as scheduled, and there was no reasonable explanation why Durham had failed to obtain different counsel, if he chose, long before the scheduled trial date. Under the circumstances, we find no abuse of the Superior Court's discretion in denying Durham's last minute continuance request.⁶

(8) Durham's final complaint is that he was prejudiced because he was not allowed to recall Smith as a witness at the evidentiary hearing on the motion for new trial. The record reflects that Smith completed her testimony on the first day of the hearing held on April 25, 2011. Smith's former attorney, who was called to rebut Smith's claim that he had coerced her into testifying falsely at Durham's trial, was unavailable to testify on the first day of the hearing. The State therefore requested, without defense objection, to continue the hearing until Smith's former counsel was available to testify on

⁵ *Riley v. State*, 496 A.2d 997, 1018 (Del. 1985).

⁶ *Id.*

May 9, 2011. After Smith's former counsel testified and contradicted Smith's version of events, Durham's counsel did not request an opportunity to recall Smith for further questioning. In the absence of any request to recall the witness for further questioning, we find no plain error in the Superior Court's failure, *sua sponte*, to recall Smith to the stand.⁷

(9) This Court has reviewed the record carefully and has concluded that Durham's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Durham's counsel has made a conscientious effort to examine the record and the law and has properly determined that Durham could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

⁷ See Del. Supr. Ct. R. 8 (2011) (in the absence of plain error, only questions fairly presented to the trial court may be argued on appeal).